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No. _____

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

MARCELINO RAMOS,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the federal Constitution will permit the California Supreme Court to penalize the State of California for seeking review of a decision of that court before this Court by invalidating a death penalty special circumstance which the California Supreme Court initially had upheld?

2. Whether it may be deemed federal constitutional error to not instruct the trier of fact regarding intent to kill as part of a felony-murder special circumstance when the California Supreme Court made intent an element of the special circumstance based upon legislative interpretation and social policy and not any federal constitutional precepts?

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3. Whether the California Supreme Court may, in essence, overrule the decision of this Court concerning the validity of the Briggs Instruction under the guise of independent state grounds?

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Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner, State of California, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Supreme Court of the State of California issued on November 1, 1984, reversing the judgment insofar as it relates to the special circumstance and penalty of death.

A petition for rehearing was denied December 13, 1984. The remittitur was issued on December 14, 1984.

OPINIONS BELOW

The opinion of the California Supreme Court (People v. Ramos (1984) 37 Cal.3d 136) appears as Appendix A of this petition. A copy of the California Supreme Court's order denying the petition for rehearing without opinion appears as Appendix B.

JURISDICTION

The judgment of the California Supreme Court was filed on November 1, 1984. A timely petition for rehearing was denied on December 13, 1984. This petition is filed within 60 days of that date and is therefore timely. This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, article 6, section 2, Amendments Five and Fourteen. California Constitution, article 6, section 13; article 1, section 27; article 1, section 28, subdivision (d). California Penal Code section 190.2, subdivision (a)(17)(i).

STATEMENT OF THE CASE

Respondent Marcelino Ramos was charged with two counts of robbery, one count of murder and one count of attempted murder in connection with a robbery and shooting incident at an Orange County fast food establishment in June of 1979. Ramos was convicted on all counts and the jury found the murder and attempted murder to be of the first degree. The jury also found that the special circumstance that the murder was

committed while appellant was engaged in a robbery was true. (Pen. Code, § 190.2, subd. (a)(17)(i).) The jury returned the death penalty. (People v. Ramos (1982) 30 Cal.3d 553, 562.)

The California Supreme Court affirmed respondent's convictions as well as the special circumstance. However, the court reversed the death penalty. The court did so because the trial judge had instructed the jury that the sentence of life imprisonment without possibility of parole may be commuted by the Governor to a sentence that includes the possibility of parole. This instruction, known as the Briggs Instruction, was mandated by California law. The California Supreme Court concluded this instruction violated the federal Constitution. (People v. Ramos, supra, at pp. 562-563.)

The State of California thereafter sought review by this Court. On July 6, 1983, this Court reversed the holding of the California Supreme Court. This Court concluded the Briggs Instruction did not violate the federal Constitution. (California v. Ramos (July 6, 1983) ____ U.S. ____, 77 L.Ed.2d 1171.)

On November 1, 1984, the California Supreme Court issued its second opinion in the Ramos case. (People v. Ramos (1984) 37 Cal.3d 136.) (Appen. A.)

In this opinion the court reversed the felony-murder special circumstance which it had upheld in the first Ramos opinion. The court

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also concluded the Briggs Instruction violated the California Constitution.[1/]

STATEMENT OF FACTS

On the evening of June 2 and early morning of June 3, 1979, Kevin Pickrell and Kathryn Parrott were working at a Taco Bell restaurant at 2820 South Bristol in Santa Ana. They were expecting to close at 1:00 a.m. Shortly before that time a "customer," later identified as respondent's co-defendant Ruben Gaitan, came in and presented a piece of paper with a food order on it to Kathryn Parrott. (RT 97, 317-320, 330-331.)

As Pickrell was preparing the food order presented by Gaitan,

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1. The first Ramos opinion of the California Supreme Court will be referred to as Ramos I while the second opinion will be referred to as Ramos II for convenience.

respondent, who was employed at the Taco Bell, entered and asked to check his work schedule. Pickrell indicated that respondent could go into the back to check his schedule. Respondent went to the back, then returned shortly and displayed a gun. Respondent ordered Ms. Parrott and Pickrell into a walk-in refrigerator. Gaitan went into the refrigerator first and removed a fire axe from the wall. That was the last Pickrell saw of Gaitan. (RT 324-335, 373, 376-379, 383-384.)

Respondent ordered Pickrell and Ms. Parrott to sit down in the refrigerator and asked them both for the location of the keys to the safe. They told him the keys were in the safe, and he went out. Pickrell and Ms. Parrott began talking, with Pickrell expressing the fear that respondent would kill them

because he knew them. Respondent returned, told them to be quiet and left again. (RT 336-337, 341-342, 352-353.)

Respondent was gone for about five minutes, then returned and told Ms. Parrott and Pickrell to go to the back of the walk-in. When they got to the back wall, respondent told them to kneel and they did so. He told them to take their hats off and bend their heads down. Respondent told them to say their prayers. Pickrell asked him not to hurt them and respondent just sort of laughed. He told Ms. Parrott to put a rag in her mouth. After that, Pickrell heard her moan and felt her come toward him. He then felt a sharp blow to the back of his head and fell over. He felt another blow to his head and heard ringing in his ears. (RT 355-362.)

Pickrell lay with his eyes closed, thinking he might be dead, but opened his eyes. He lay there for awhile, then got up, got some change and called the police. When the police arrived, he told them it was respondent who had been in the walk-in at the time he was injured. (RT 362-367.)

A police officer who arrived about 1:20 a.m. found Kathryn Parrott lying motionless in the refrigerator with a terrycloth towel stuffed in her mouth, and with no pulse. (RT 2-10, 3-4, 13-17.) The autopsy surgeon concluded Ms. Parrott died from cerebral destruction due to a gunshot wound to the head. There was a single gunshot wound which appeared to be a contact wound. Additionally, she had suffered two deep lacerations in the back of the head which appeared to have been

inflicted at or about the time of death, and had been inflicted by a blunt, heavy object. (RT 69-77.) Kevin Pickrell had suffered lacerations to the back of the head, including one with an area around it which appeared to be a burn or abrasion. It appeared he had been struck in the back of the head with a metallic object that then moved around to the side of the head, hit a bony prominence and shattered, with some fragments continuing on and exiting the head, taking some tissues from the ear as they left. (RT 305-310, 314.)

The manager of the Taco Bell calculated a loss of approximately $1,200.00 from the robbery. (RT 37-41.) Respondent and Gaitan were taken into custody on June 3, and the same day an apartment at 3101 South Bristol was searched pursuant to a warrant. Money

in the amount of approximately $1,000.00 was recovered. (RT 101, 103-105, 117.)

Respondent did not present a defense at the guilt phase. Ruben Gaitan testified on his own behalf and admitted copying a food order which respondent had prepared while they were in the apartment, but denied any connection with the robbery and killing. (RT 452, 455, 457-460, 467-469.)

At the penalty phase the prosecution presented the testimony of one David Lam, who had been in custody for felony non-support in June of 1979. One morning while awaiting to go to court he saw respondent standing in front of him, chained with two other people. He overheard bits and pieces of a conversation to the effect that they were not going to be found guilty of the charge because they were sure the people were no longer

alive. Respondent was saying to the other person how much of a "trip" it was; how the people were on their hands and knees begging for their lives before he shot them. (RT 729-732.) The People also introduced evidence of portions of guns, a notebook, letter and will which were found in the apartment. (RT 754-760, 762-764.)

The presentation of defense evidence concerned the largest portion of the penalty phase.[2/] Respondent testified on his own behalf and admitted robbing and shooting both the victims, but denied that he intended to kill them. He testified that when he first went back into the cooler he had merely

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2. Defense evidence presented at the penalty phase is set forth at some length in the opinion of the California Supreme Court. (Ramos I, supra, 30 Cal.3d at pp. 564-567.)

knocked out the victims with a piece of iron pipe. Ruben Gaitan had told him it was necessary to kill them, so he had gone back in and pointed the gun at each one of the victims with the intent just to graze them and knock them out. (RT 834-854, 877, 900.) He testified that the only reason he told the victims to say their prayers before he pulled the trigger was just to scare them, and he did not laugh but just smiled. (RT 913, 930.) Respondent also testified to the effect that Kevin Pickrell had laughed at him when he first displayed the gun, and that made him mad. He further testified that he had had one or two drinks and had taken some "speed." (RT 844-846.)

Friends and relatives testified as to respondent's childhood and early youth in San Antonio, Texas.

Respondent and his brother had been adopted when they were infants, and both adoptive parents had died by the time he turned fourteen. After that he stopped going to school regularly and began hanging around with bad company, including Ruben Gaitan. Although respondent had gone into the Texas National Guard at one time, otherwise he had worked only at menial jobs. (RT 774-779, 792-800.) A defense psychiatrist expressed the opinion that respondent was an inadequate personality, with a diffused, generalized type of brain damage and elements of a borderline schizophrenic personality. He opined that some of the dynamics of the shooting included respondent's preexisting personality factors, the taking of amphetamines with alcohol a few hours before, preexisting brain

damage, disordered reality testing, anger at Ruben Gaitan and anger because Kevin Pickrell did not at first take him seriously. The doctor also believed that respondent may have intended only to graze the victims. (RT 959-960, 970-971, 992-1001.)

A defense psychologist testified respondent had a full scale I.Q. of 75, and that the result of a test of neurological impairment indicated mild congenital brain damage. (RT 1069, 1076-1078.)

HOW THE FEDERAL QUESTIONS ARE PRESENTED

This case presents three federal questions of substantial importance.

The first federal question relates to the right of the state to fundamental fairness and due process.

In Ramos I (30 Cal.3d 553), the California Supreme Court upheld the felony-murder special circumstance. Nevertheless, it reversed the death penalty because the trial court instructed the jury on the Governor's commutation power. The court concluded this instruction, known as the Briggs Instruction, violated the federal Constitution. The State of California sought review of this issue by this Court and this Court concluded the instruction did not violate the federal Constitution. The case was remanded.

In the interim the California Supreme Court had concluded a felony-murder special circumstance could not stand unless it had been established the killing also had been intentional. (Carlos v. Superior Court (1983) 35 Cal.3d 131.) Respondent argued in

supplemental briefing that Carlos compelled invalidation of the felony-murder special circumstance in this case. Petitioner pointed out in a response that Carlos should not be applied retroactively to this case and also argued that the California Supreme Court had upheld the felony-murder special circumstance in Ramos I and should not modify that holding following remand by this Court.

Nevertheless, the California Supreme Court applied the Carlos decision to this case and invalidated the felony-murder special circumstance it had upheld in Ramos I. (See People v. Ramos (Ramos II) (1984) 37 Cal.3d 136 (Appen. A.) Petitioner objected to this result in a rehearing petition.

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The petition argued the invalidation of a special circumstance the court had already upheld penalized the State of California for seeking review from this Court after Ramos I. It is well settled that a defendant cannot be penalized for exercising his right to appeal. (Bullington v. Missouri (1981) 451 U.S. 430.) The People of the State of California just like a defendant are entitled to due process and fundamental fairness. Consequently, the State of California should not have been penalized for exercising its right to appeal the decision of the California Supreme Court in Ramos I to this Court. However, the rehearing petition was denied. Accordingly, this case presents a fundamental question regarding the scope of the right of the state as well as the defendant to due process and fairness.

(Stein v. New York (1952) 346 U.S. 156, 197; Snyder v. Massachusetts (1934) 291 U.S. 97, 123.)

This case presents a second fundamental issue as well. In Carlos v. Superior Court, supra, 35 Cal.3d 131, the California Supreme Court concluded that a felony-murder special circumstance could not stand unless the trier of fact was instructed and found intent to kill. This decision was reached as a matter of statutory interpretation and social policy. However, in People v. Garcia (1984) 36 Cal.3d 539, the court elevated what appeared to be state procedural error into federal constitutional error. The court also concluded that absent certain narrow circumstances the error was prejudicial.

Petitioner had pointed out in supplemental briefing and oral argument

that any conceivable error was harmless as intent to kill had been established as a matter of law anyway. However, in Ramos II (appen. A) the court concluded intent to kill had not been established as a matter of law and the case had to be reversed in light of Carlos and the prejudice test set forth in Garcia.

Petitioner's rehearing petition pointed out that Ramos II and Garcia were incorrectly decided as Carlos error could not be elevated into federal constitutional error as Carlos was not based on federal grounds. The Supreme Court of California, however, denied the petition for rehearing. The issue of whether failure to instruct on an element of a special circumstance mandated by a state court can amount to federal constitutional error is presented to this Court in this petition.

(Cf. Connecticut v. Johnson (1983) 460 U.S. 73.) This issue is already before this Court in California v. Garcia (Petn. for Certiorari pending).

This case also presents a third fundamental question as to the authority of the state court to use the doctrine of independent state grounds as a means of overruling decisions of this Court.

This Court concluded in California v. Ramos, supra, 77 L.Ed.2d 1171, that the Briggs Instruction did not violate the federal Constitution and remanded the case to the California Supreme Court for further consideration. Respondent asked that Court to invalidate the instruction under the California Constitution while petitioner pointed out the court could not do so without, in essence, overruling

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this Court since the bases for upholding the instruction applied with equal force under either Constitution.

Nevertheless, the California Supreme Court purported to rely on the California Constitution to invalidate the Briggs Instruction. A petition for rehearing was filed by petitioner pointing out the court did nothing more than exercise its own judgment as to the invalidity of the instruction, overruled this Court's evaluation of the validity of the instruction, and, in essence, sat as a reviewing court of this Court in violation of the Supremacy Clause of the United States Constitution. (U.S. Const., art. 6, cl. 2.)

However, the petition for rehearing was denied. Thus, this case also presents a fundamental federal question with regard to the power of

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state courts under the Supremacy Clause to sit as a reviewing court of this Court under the guise of using independent state grounds.

REASON FOR GRANTING THE WRIT

The writ should be granted in this case as three questions of fundamental national import are presented.

First, whether the due process clause of the federal Constitution protects the right of the state to due process and fundamental fairness in the same way that it protects a defendant's right to due process and fairness so that the state, like a defendant, may not be penalized for exercising its right to seek review from this Court of a decision by a state court. If the decision of the California Supreme Court in Ramos II, invalidating the special circumstance it had upheld in Ramos I,

is allowed to stand here, the rights of the State of California and other states in similar circumstances to seek review from this Court could be chilled.

Second, this case presents an even more monumental issue as to whether a state court may sit as a reviewing court of this Court under the guise of using independent state grounds. If this is permitted, the fundamental notion that decisions of this Court are binding on lower courts could be seriously undermined. (U.S. Const., art. 6, cl. 2.) In this case the California Supreme Court, in essence, overruled this Court when it invalidated the Briggs Instruction under the California Constitution after this Court had upheld the instruction under the United States Constitution.

Review is also desired to determine whether the California Supreme Court may require intent to kill for the felony-murder special circumstance as in Carlos v. Superior Court, supra, 35 Cal.3d 131, and then hold the failure of the jury to be instructed on this requirement somehow amounts to federal constitutional error as suggested in People v. Garcia, supra, 36 Cal.3d 539.

Thus, review of the decision of the California Supreme Court is of the utmost necessity here.

ARGUMENT

I

CERTIORARI SHOULD BE GRANTED AS THE CALIFORNIA SUPREME COURT'S REVERSAL OF THE FELONY-MURDER SPECIAL CIRCUMSTANCE BASED ON CARLOS V. SUPERIOR COURT VIOLATES THE PEOPLE'S RIGHT TO DUE PROCESS

Initially, it is respectfully requested certiorari be granted as the

decision of the California Supreme Court in Ramos II reversing the felony-murder special circumstance in light of Carlos v. Superior Court (1984) 35 Cal.3d 131 violates the right of the People to due process.

It is well settled that a defendant cannot be penalized for exercising his right to appeal. (People v. Hood (1969) 1 Cal.3d 444, 459; Bullington v. Missouri (1981) 451 U.S. 430.) The State, just like a defendant, is entitled due process and fundamental fairness. Consequently, the State as well as the defendant, cannot be penalized for exercising its right to appeal the California Supreme Court's decision in Ramos I to this Court. "The People of the State are also entitled to due process of law." (Stein v. New York (1952) 346 U.S. 156, 197.) Justice,

though due to the accused, is due to the accuser too. (Snyder v. Massachusetts (1934) 291 U.S. 97, 123.)

The decision of the California Supreme Court in Ramos II (appen. A) resulting in a reversal of the felony-murder special circumstance has, in essence, penalized the right of the People to appeal decisions of that court to the United States Supreme Court and has deprived the People of their right to due process. Thus, certiorari is required here.

In the first Ramos decision, People v. Ramos (1982) 30 Cal.3d 553, (Ramos I) respondent raised the issue of the validity of the felony-murder rule and argued the felony-murder special circumstance should require an intent to kill. (Id. at pp. 589-590 and fn. 17.) The California Supreme Court

expressly upheld the felony-murder special circumstance relying on well-settled law, but suggested a reexamination of the rule might be appropriate in a case other than this one. That court also expressly declined to consider whether the felony-murder special circumstance should require an intent to kill before the death penalty may be imposed. (Ramos I, supra, 30 Cal.3d at p. 590, fn. 17.)

Moreover, that court expressly observed that "The record in the guilt and penalty phases strongly suggests that the jury viewed the killing in this case as intentional and malicious. It is thus unlikely that the giving of the felony-murder instruction worked to appellant's detriment." (Ramos I, supra, at p. 590.) Thus, the court basically concluded the killing in this case was intentional.

The only part of the proceeding that was reversed was the penalty phase of the trial. This was caused by the fact that court concluded the Briggs Instruction violated the California Constitution. (Ramos I, supra, 30 Cal.3d at p. 602.)

Thereafter, petitioner petitioned this Court for review of the California Supreme Court's ruling on the Briggs Instruction. This Court ultimately reversed the judgment of that court on July 6, 1983, after finding the Briggs Instruction did not violate the United States Constitution. The case was then remanded to the California Supreme Court for further proceedings.

That court did not recalendar this case until late August of 1984. Meanwhile, on December 12, 1983, that

court decided Carlos v. Superior Court, supra, 35 Cal.3d 131. This case held the prosecution had to prove the defendant had the intent to kill in order for the prosecution to seek to have the trier of fact sustain a felony-murder special circumstance.

Thereafter, in People v. Garcia (1984) 36 Cal.3d 539, that court concluded absent certain narrow circumstances it was reversible error for a trier of fact to sustain a felony-murder special circumstance where the trier of fact had not been instructed it had to find the defendant's killing of the victim was intentional.

That court then applied Carlos and Garcia to this case and reversed the same special circumstance it had already upheld. (People v. Ramos (1984) 37 Cal.3d 136 (Ramos II, appen. A).) To

petitioner it seems manifestly inappropriate for that court to now reverse a special circumstance it had previously upheld. This is particularly true when that court could have considered the issues relating to the felony-murder special circumstance, but expressly declined to do so in Ramos I.

Furthermore, it seems the People are being unfairly treated as that court now concludes the felony-murder special circumstance must be reversed because the jury was not instructed the killing was intentional although that court essentially concluded in Ramos I that the killing was intentional. (Ramos II, supra, 37 Cal.3d at pp. 145-150.) This result has penalized the People for exercising their rights to appeal to the United States Supreme Court.

That court also notes in the opinion that principles of the doctrine of law of the case do not apply where the law has changed between intervening appellate decisions. Thus, the People cannot rely on that court's conclusions in Ramos I. (See Ramos II, supra, 37 Cal.3d at p. 146.) Such a result is unfair for several reasons here. First, the California Supreme Court could have dealt with the issue of the validity of the felony-murder special circumstance in Ramos I, but declined to do so. Second, that court went out of its way in Ramos I to observe the defendant in this case had the intent to kill. Third, that court did not immediately calendar the Ramos case on remand from this Court for about one year. Oral argument was not held until late August of 1984, nearly one year after Ramos I

was reversed by this Court. Because of this delay, Carlos and Garcia were decided in the interim.

Accordingly, petitioner would respectfully submit all these factors coalesce to constitute fundamental unfairness to the State of California in this case, have penalized the State for appealing, and violated the right of the People to due process and fundamental fairness.

II

THE HARMLESS ERROR TEST ESPOUSED IN PEOPLE v. GARCIA IS INCORRECT

Certiorari also should be granted so that People v. Garcia, supra, 36 Cal.3d 539, can be evaluated. This matter is already before this Court in Garcia v. California (cert. pending). In Carlos v. Superior Court, supra, 35 Cal.3d 131, the California Supreme Court

held as a matter of social policy and legislative interpretation that no one could be put to death based upon the felony-murder special circumstance unless the trier of fact was instructed on and concluded the defendant had the intent to kill. Carlos was not based on the United States Constitution, but based upon a social policy decision of that court and corresponding interpretation of the 1978 death penalty initiative. Under these circumstances it seemed that the correct test for prejudice where Carlos error occurred would be the state test of harmless error in

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the California Constitution and People v. Watson (1956) 46 Cal.2d 818, 835-837.)[3/]

However, in People v. Garcia, supra, 36 Cal.3d at page 539, the California Supreme Court converted state procedural error into federal constitutional error.

As interpreted by that court, the decisions of this Court purportedly

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3. The California harmless error test is set forth in the California Constitution. It provides as follows:

> "No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of

suggest that where intent is an element of a crime, instructions which do not let the jury resolve the issue of intent violate the federal constitution. In those cases, the lack of instructions on intent is prejudicial error except in

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Footnote 3 continued:

> justice. [New section adopted November 8, 1966.]" (Cal. Const., art. 6, § 13; original emphasis.)

The California Supreme Court has described the test in the following language:

> "That a 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire case, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (People v. Watson, supra, 46 Cal.2d at pp. 835-837.)

certain very narrow circumstances. (People v. Garcia, supra, 36 Cal.3d at p. 539.)

However, there are several basic flaws in the interpretation of these cases. First, the decisions of this Court in Sandstrom v. Montana (1979) 442 U.S. 510; Connecticut v. Johnson (1983) 460 U.S. 73, and Mullaney v. Wilbur (1975) 421 U.S. 684, dealt with situations where presumptions were involved and the trier of fact was affirmatively required to presume certain elements of a crime had been proved when the prosecution had not necessarily proved these elements.

This is far different from the situation presented here where the jury was not told intent could be presumed, but was simply not instructed on the issue of intent at all. Saying nothing

at all is certainly different and far less prejudicial than affirmatively instructing the jury to presume a matter which had not been proved had to be presumed proved.

Moreover, this Court's cases rest on the fundamental precept that a defendant cannot be convicted of a crime unless the jury is instructed as to all the elements of the crime. To do so would violate the basic tenets of due process since no man should be punished for a crime unless the prosecution has established all the elements of the crime.

Yet, there is no reason to believe such a rule would carry over to special circumstance in a death penalty case. In a situation such as this one the prosecution has met the basic standards of due process by proving every

element of the crime the defendant has been charged with. It also proved the defendant fit within the felony-murder special circumstance. The only error was that the jury was not advised of the fact (based on a decision of the California Supreme Court as a matter of social policy and corresponding legislative interpretation) that a felony-murder special circumstance could not be sustained unless the defendant had the intent to kill.

Yet, this does not necessarily amount to federal constitutional error of the type discussed in the decisions of this Court. Rather, it seems to be more of an issue of California constitutional error. Thus, certiorari should be granted to evaluate the correctness of Garcia.

Even assuming arguendo Garcia espouses the correct test for harmless error, it is clear respondent suffered no prejudice under the federal Constitution as Ramos' intent to kill was established as a matter of law by the evidence.

The evidence shows Ramos fired the gun at the victims from point blank range, killing one of the victims and wounding the other. Such evidence unequivocally establishes respondent had the intent to kill. The opinion of the court, however, points to the fact the bullet only grazed one of the victims. (Ramos II, supra, 37 Cal.3d at p. 148.) However, the fact that Ramos was unsuccessful in killing one of the victims does not mean he did not intend to kill the victim. The fortuity of where the bullet ended up has no bearing on the

fact Ramos intended to kill the victims since he fired his gun at them at close range and killed one of them.

Moreover, the California Supreme Court's conclusion the evidence does not support a finding of intent to kill as a matter of law neglects to consider the setting in which the killing took place. Ramos had the two victims kneel on the floor, remove their hats, and told them to say their prayers. He also forced Parrott to place a rag in her mouth. Given these facts, it is inconceivable Ramos did not have the intent to kill the victims.

In Hopper v. Evans (1982) 456 U.S. 605, 613, the defendant shot the victim in the back and killed him. This Court concluded intent to kill was established as a matter of law. A contrary conclusion could hardly be

reached on the facts presented here. When a defendant fires a loaded gun at someone's head at point blank range it can hardly be said the defendant did not have the intent to kill. (See also People v. Velazquez (1980) 26 Cal.3d 425.)

Finally, while the California Supreme Court has now chosen to limit its language in Ramos I, it is clear beyond any doubt that in Ramos I that court essentially found the killing was intentional and malicious. (Ramos I, supra, 30 Cal.3d at p. 590, fn. 17.) Neither the passage of time nor a change in the law can change this fact.

Accordingly, as Carlos error is not federal constitutional error and the evidence establishes as a matter of law that Ramos had the intent to kill in this case, certiorari should be granted.

III

CERTIORARI SHOULD BE GRANTED AS THE DOCTRINE OF INDEPENDENT STATE GROUNDS WAS INAPPROPRIATELY USED IN THIS CASE

Petitioner next requests certiorari be granted because the California Supreme Court inappropriately used the doctrine of independent state grounds to invalidate the Briggs Instruction. This instruction tells the jury the governor has the power to commute the term of life without parole.

In Ramos I the California Supreme Court concluded the Briggs Instruction violated the federal Constitution and required a reversal of the penalty judgment and a remand for further proceedings. (Ramos I, supra, 30 Cal.3d 553.) The State of California petitioned this Court for a writ of certiorari. This Court granted certiorari

to review the decision and concluded the Briggs Instruction did not violate the federal Constitution. (California v. Ramos (July 6, 1983) ___ U.S. ___, 77 L.Ed.2d 1171.)

In that opinion this Court expressly declined to decide whether the Briggs Instruction violated the California Constitution. However, it noted on remand the California Supreme Court could address this issue. (California v. Ramos, supra, at p. 1178, fn. 4b.)

However, petitioner would respectfully submit that what occurred in this case was not a decision on independent state grounds, but a decision by the California Supreme Court to overrule the judgment of this Court. We believe such a decision is contrary to the fundamental precept that decisions of the

United States Supreme Court interpreting the federal Constitution are the supreme law of the land and are binding on lower courts. (U.S. Const., art. 6, § 2; Sims v. Georgia (1967) 385 U.S. 538, 544.)

Although the California Supreme Court initially had an opportunity to decide the Briggs Instruction issue on independent state grounds in the first Ramos case, it did not do so. Indeed, it expressly declined to do so. (Ramos I, supra, 30 Cal.3d at p. 600, fn. 24.) Given this fact, petitioner finds it difficult to believe there was any essential state policy compelling use of independent state grounds after remand.

Moreover, what that court has done is examine the decision of this Court in California v. Ramos, and then has exercised its own judgment and

judicial views as to whether the Briggs Instruction may properly be used.

For example, that court first observes the Briggs Instruction is misleading as it only tells the jury that the term of life without parole is subject to commutation and does not tell the jury that the punishment of death is subject to commutation. (Ramos II, supra, 37 Cal.3d at pp. 153-156.) In reaching this conclusion the court does not rely on any specific authority to support this conclusion other than its own opinions on the matter.

However, the justices of this eminent Court exercised their own independent judgment on the issue and concluded the instruction did not skew the jury toward death. As this Court noted:

/

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"Moreover, we are not convinced by respondent's argument that the Briggs Instruction alone impermissibly impels the jury toward voting for the death sentence. Any aggravating factor presented by the prosecution has this impact. As we concluded in Part II, supra, the State is constitutionally entitled to permit juror consideration of the Governor's power to commute a life sentence. This information is relevant and factually accurate and was properly before the jury. Moreover, the trial judge's instructions 'did not place particular emphasis on the role of [this factor] in the jury's ultimate decision.' Zant v. Stephens, ____ U.S. ____, ____, 77 L.Ed.2d 235, 103 S.Ct. ___ (1983); cf. id., at ____ ____, 77 L.Ed.2d 235, 103 S.Ct. ____."
(California v. Ramos, supra, 77 L.Ed.2d 1171, 1188, fns. omitted.)

The California Supreme Court next points out that even if the instruction were modified to explain that the commutation power also applied to the death penalty, the instruction still

would violate the state Constitution as it allows the jury to consider speculative matters which should not influence the jury's determination. This is so we are told because the jury should not consider post-conviction actions by other governmental entities in determining the sentence to be imposed. (Ramos II, supra, 37 Cal.3d at pp. 155-158.)

This conclusion once again does not rest on any specific provision of the California Constitution or any specific point of California policy. Instead, it consists of a value judgment by that court as to what is speculative. However, the eminent justices of this Court have exercised their own judgment on the same instruction and specifically concluded it did not involve speculative matters.

Instead, by bringing to the jury's attention the possibility that the defendant may be returned to society, the instruction invites the jury to assess whether the defendant is someone whose probable future behavior makes it undesirable that he be permitted to return to society. Thus, it focuses the jury on the defendant's probable future dangerousness. (California v. Ramos, supra, 77 L.Ed.2d at p. 1182.)

The Supreme Court of California further concludes, without citation to any specific provision of the California Constitution or any specific policy in the state on this issue, that the instruction deflects the jury from its proper function.

However, the controlling majority of this Court reached a contrary conclusion based upon their

judicial evaluation of the instruction. This Court concluded that the instruction focused attention to the defendant's future dangerousness so the jury's deliberation is individualized. Moreover, the instruction simply places before the jury an element to be considered, along with others, in determining the appropriate sentence.

Finally, and perhaps of most import, the instruction is an accurate statement of a potential sentencing alternative, and corrects the misconception conveyed to the jury by the phrase "life imprisonment without possibility of parole." (California v. Ramos, supra, 77 L.Ed.2d at p. 1186.)

> "The Briggs instruction thus corrects a misconception and supplies the jury with accurate information for its deliberation in selecting the appropriate sentence." (Fn. omitted.)

Thus, certiorari should be granted here the California Supreme Court did not really exercise its right to use independent state grounds to decide the validity of the commutation instruction. Rather, the court, in essence, did nothing more than exercise its decision-making power to overrule the judgment of this Court. Indeed, this conclusion is buttressed by the fact the dissent by Justice Lucas rebuts the points raised in the majority opinion by simply citing to specific portions of the decision of this Court in California v. Ramos. (Ramos II, supra, 37 Cal.3d at pp. 159-162 (Lucas, J., dissenting).)

Furthermore, we would respectfully suggest that it is questionable whether the framers of the California Constitution ever intended to have the

shield of the California Constitution used as a sword for the California Supreme Court to overrule decisions of the United States Supreme Court.

Indeed, in February of 1972, the California Supreme Court held the death penalty law in effect at that time violated the California Constitution. (People v. Anderson (1972) 6 Cal.3d 628.)

However, within nine months, on November 7, 1972, the People of the State of California nullified the Anderson decision through Proposition 17 which expressly provided the death penalty did not constitute cruel or unusual punishment under the California Constitution. The initiative added section 27 to article I of the California Constitution. It provides:

> "All statutes of this state in effect on February

> 17, 1972, requiring, authorizing, imposing, or relating to the death penalty are in full force and effect, subject to legislative amendment or repeal by statute, initiative or referendum.
>
> "The death penalty, provided for under those statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments within the meaning of Article I, Section 6 nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution."

This certainly suggests the citizens of California did not wish to have the death penalty reevaluated under the California Constitution.

While we recognize the California Supreme Court has held that article I, section 27 of the California Constitution does not automatically validate any death penalty related matter under the state Constitution (see

People v. Superior Court (Engert) (1982) 31 Cal.3d 797, 808), we would respectfully note this provision reflects a strong feeling on the part of the citizens of this state who voted for article I, section 27 that the California Constitution not be used as a means of reversing death penalty judgments. This view is further supported by the recent passage of Proposition 8 by the voters which amended the California Constitution to bring California search and seizure law in line with federal search and seizure law. (Cal. Const., art. I, § 28, subd. (d); People v. Daan (1984) 161 Cal.App.3d 22.)

Furthermore, petitioner would note the timing of the California Supreme Court's ruling -- after a decision by the United States Supreme Court -- also suggests that court did not use

independent state grounds as a basis for invalidating the Briggs Instruction. Rather, the court simply chose to overrule this Court in the guise of using independent state grounds. Thus certiorari should be granted in this case.

* * *

CONCLUSION

Therefore petitioner respectfully requests this Court grant certiorari.

Respectfully submitted,

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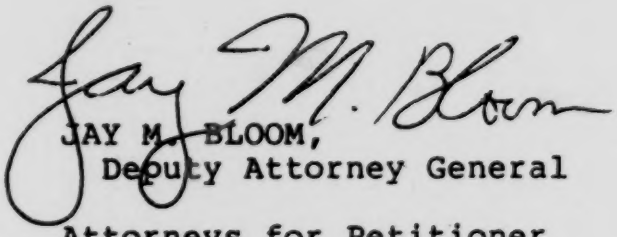

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No: _____
October Term, 1984

PEOPLE OF THE STATE OF
CALIFORNIA

Petitioner,

v.

MARCELINO RAMOS,

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within PETITION FOR WRIT OF CERTIORARI & APPENDICES as follows: To Alexander L. Stevas, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and 39 copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing 3 copies in a separate envelope addressed for and to each addressee named as follows:

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Laurence P. Gill, Clerk
Supreme Court of California
350 McAllister Street, Suite 4050
San Francisco, CA 94102

FOR DELIVERY TO:
Hon. R. J. Beacom

Each envelope was then sealed and with the postage prepaid deposited in the United States Mail by me at San Diego, California, on the 28th day of January, 1985.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, January 28, 1985.

Clifford E. Reed Jr.
CLIFFORD E. REED, JR.

Subscribed and sworn to before me
this 28th day of January, 1985.

Vida M. Allen
Notary Public in and for said County and State

VIDA M. ALLEN
NOTARY PUBLIC - CALIFORNIA
COUNTY OF SAN DIEGO
My commission expires Aug. 20, 1986

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84-1227

No. _____

JAN 30 1985
ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 19___

THE PEOPLE,

Petitioner and Respondent,

v.

MARCELINO RAMOS,

Defendant and Appellant.

APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

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APPENDIX A

APPENDIX A

[Filed November 1, 1984]

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

THE PEOPLE,	)	
	)	Crim. 21352
Plaintiff and	)	Super. Ct.
Respondent,	)	C-42382
	)	
v.	)	
	)	
MARCELINO RAMOS,	)	
	)	
Defendant and	)	
Appellant.	)	
	)	

(SEE CONCURRING AND DISSENTING OPINION)

This case is before us on remand from the United States Supreme Court. When it was last here, we concluded no reversible error had occurred at the guilt phase of defendant's trial but that an instruction given at the penalty phase -- the so-called Briggs Instruction, described below -- violated the federal Constitution and required a reversal of the penalty judgment and a

remand for further proceedings. (People v. Ramos (1982) 30 Cal.3d 553 [Ramos I].) In light of our ruling on the Briggs Instruction, we did not reach other claims of error raised by defendant. The United States Supreme Court granted certiorari to review our decision, and ultimately concluded, in a five to four holding, that the Briggs Instruction did not violate the federal Constitution. (California v. Ramos (1983) 103 S.Ct. 3446.) Recognizing that its resolution of the single federal constitutional issue before it left a variety of issues still to be determined by this court, the high court remanded the matter to us "for further proceedings not inconsistent with [its] decision." (103 S.Ct. at p. 3460.) We granted the parties leave to file supplemental briefs and set the case for reargument.

Defendant initially contends that under this court's recent decision in Carlos v. Superior Court (1983) 35 Cal.3d 131, a remand for a new determination of both special circumstances and penalty is required. He points out that at trial his counsel explicitly requested a ruling that the People had the burden of proving an intentional killing as an element of the felony-murder special circumstance with which he was charged; the trial court denied the request, interpreting the statute as omitting any such intent-to-kill requirement. Although the Attorney General acknowledges that the trial court erred in light of our holding in Carlos, he seeks to avoid a reversal and remand on several theories. As we shall explain, however, we conclude that under the

principles established in People v. Garcia (1984) 36 Cal.3d 539, retrial of the special circumstance and penalty phases, before a properly instructed jury, is required.

In light of this conclusion, we need address only one additional issue on which we believe guidance should be provided for retrial: the question of the validity of the Briggs instruction under the state Constitution. For the reasons discussed below, we conclude that, considered in light of longstanding California principles and authorities, the Briggs Instruction is incompatible with state constitutional doctrine and that juries should not be instructed pursuant to its terms.

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I

The facts of the case are set forth in Ramos I. (30 Cal.3d at pp. 563-566.) We briefly review only those relevant to the issues now before us.

Kevin Pickrell, one of the victims of the offenses in question, was the prosecution's principal witness at trial. He testified that in the early morning hours of June 3, 1979, he and Kathryn Parrott were working at a Taco Bell restaurant in Santa Ana, California. Just before the restaurant's closing time, a customer, later identified as codefendant Ruben Gaitan, entered and placed an order. While the order was being filled, defendant Ramos entered. Pickrell recognized defendant because he was employed at that time as a janitor at the Taco Bell. Defendant asked to check his work schedule and Pickrell

permitted him to enter the work area in the rear of the store.

Within a minute or two defendant emerged from the back with a rifle partially covered by a coat. Pickrell thought it was some sort of joke and began laughing, but defendant told him he was not kidding. He directed Gaitan to hop over the counter, and ordered Pickrell and Parrott to enter the restaurant's walk-in refrigerator at the rear of the store and to face the back wall. Pickrell testified that defendant acted in a manner unlike any time he had seen him in the past, almost as though he did not recognize Pickrell or Parrott; Pickrell suspected that defendant might have been under the influence of a drug.

While Parrott and Pickrell remained in the refrigerator, defendant left and entered the refrigerator

several times, asking about the keys to the restaurant safe and telling them to keep quiet. He then directed Parrott and Pickrell -- who were still facing the rear wall -- to kneel on the floor, remove their hats and say their prayers. He also told Parrott to place a rag in her mouth.

Pickrell testified that the next thing he remembered was hearing a dull "thud" and feeling Parrott fall toward him. Almost simultaneously, he felt a sharp blow to the back of his head and fell forward. Sometime thereafter, he felt another blow to his head followed by a ringing in his ears; he testified, however, that he never heard a gunshot, nor smelled smoke.

When he heard no movement in the building, Pickrell got up and called the police. On their arrival, they

found that Parrott was dead. Later medical examination revealed that she had two lacerations on the back of her head, apparently caused by a blow from a blunt, heavy object at or near the time of death, and that she had died of a gunshot wound to the head. A medical examination of Pickrell disclosed similar lacerations on the back of his head and a piece of tissue missing from his right ear which could have been caused by a glancing gunshot.

On the basis of Pickrell's identification, defendant and Gaitan were arrested that same day. The police obtained a search warrant for their apartment and found additional evidence tying them to the robbery.

At the conclusion of the prosecution's case - outside the presence of the jury -- defense counsel requested

a ruling from the court on the elements of the felony-murder special circumstance with which defendant was charged. Counsel took the position that in order to establish the special circumstance the People were required to prove both that the killing occurred during the commission of a robbery and that the killing was intentional. The trial court rejected the argument and ruled that the special circumstance could be established under the felony-murder doctrine, in which an intent to kill is not a required element.

Defense counsel then set forth an offer of proof for the record. He stated: "For the record, Mr. Ramos' defense would have been that he did indeed commit the robbery and he did indeed perpetrate this crime, but he did not intend to kill either one of the

victims and that the fact that Miss [Parrott] died was an accident. . . . in view of the court's ruling that that's not a defense, Mr. Ramos will offer no defense."

True to counsel's word, defendant presented no evidence at the guilt/special circumstance phase. On this state of the evidence, the jury found defendant guilty on all counts and also found true the charged special circumstance.

At the penalty phase, the defense presented considerable evidence of defendant's childhood and background, disclosing that he and his brother were adopted as infants, but his adoptive father died when he was 8 and his adoptive mother when he was 13 or 14. From that time on he lived alone with his older brother, stopped attending school

and church regularly and began associating with a "bad" element, including codefendant Gaitan -- his closest friend.

A psychiatrist and a psychologist who had interviewed and conducted several tests on defendant testified on his behalf. Their testing revealed that defendant had congenital brain damage, had a full scale IQ of 75 --putting him in the "borderline retardation" category -- and was "borderline schizophrenic."

In addition, defendant testified on his own behalf. He admitted committing the robbery and shooting Parrott and Pickrell, but expressly denied intending to kill them. He explained that at first he simply hit each of the victims on the head with a metal pipe and left them unconscious in the refrigerator. When he came into the front part of the store, however, Gaitan

told him that the two must be killed to prevent them from identifying him or Gaitan. He then reentered the refrigerator, intending only to make it look as though he had killed the two victims if Gaitan came in to check: "I said to myself: In order for [Gaitan] to think that I would kill them, I'll make it look like -- in case he decides to come in and check, you know. So then I walked towards them. I stood a foot away from each person. I pointed the gun slightly upward at an angled position to graze them or something, because I never shot a weapon at that close a range before . . . My intentions were not to kill them; my intentions were to just graze them, kind of knock them out . . . I pointed the weapon at an angled position, like upwards, to sort of graze them, and I fired the shot . . . After

I shot, I turned around and I looked at Mr. Pickrell, Kevin, and I went back in back of him about a foot away, and I fired an angle position at him, too."

Finally, the defense established that this incident was defendant's first involvement with the law, that he had no prior convictions or even arrests, no history of violence in any other setting, and that defendant was only 21 years old at the time of the offenses.

After about three hours of deliberation, the jury returned a verdict of death.

II

As noted, defendant's initial contention is that a reversal of the special circumstance finding and penalty judgment is required under our decision in Carlos, where we concluded -- contrary

to the trial court's ruling in this case -- that an intentional killing is a required element of the "felony-murder" special circumstance set forth in section 190.2, subdivision (17).

The Attorney General first argues that we need not reach the substantive merits of this claim because defendant is precluded from raising this issue by virtue of the law of the case doctrine. (See generally People v. Shuey (1975) 13 Cal.3d 835, 840-848.) He contends that because the dispositive order in Ramos I reversed only the penalty judgment and affirmed the judgment in all other respects (30 Cal.3d at p. 602), that decision necessarily upheld the special circumstance finding which defendant may not reopen at this time.

In DiGenova v. State Board of Education (1962) 57 Cal.2d 167, 178-180, however, we explained that an exception to the law of the case doctrine "has been applied to cases where the controlling rules of law have been altered or clarified by a decision intervening between the first and second determination of the appellate courts. [Citation.]" (Ibid.) Carlos is, of course, just such a clarifying, intervening decision. Consequently, the law of the case doctrine is no bar to this claim.

On the merits, the Attorney General does not suggest that the trial court ruling is compatible with Carlos. Instead, he argues that reversal is not required either (1) because Carlos' interpretation of the special circumstance provision should not be applied

to cases tried before the Carlos decision, or (2) because the error was not prejudicial. Under our recent holding in Garcia, neither contention has merit.

On the retroactivity point, Garcia makes clear that "[t]he Carlos holding should apply retroactively to all cases not yet final." (36 Cal.3d at p. 549.) Accordingly, Carlos is fully applicable here.

With respect to the question of prejudice, Garcia concludes after a detailed analysis of recent federal decisions "that the United States Supreme Court would find the error [in failing to instruct the jury on the requisite intent] reversible per se" (id., at p. 554), subject only to a few, narrow exceptions. As set forth in Garcia, the only instances in which a failure to give a proper intent

instruction under Carlos may not require reversal of a special circumstance finding are (1) "'if the erroneous instruction was given in connection with an offense for which the defendant was acquitted and if the instruction had no bearing on the offense for which he was convicted,'" (36 Cal.3d at p. 554 [quoting Johnson v. Connecticut (1983) 103 S.Ct. at p. 977]), (2) "'if the defendant conceded the issue of intent'" (36 Cal.3d at p. 554 [quoting Johnson v. Connecticut, supra. 103 S.Ct. at p. 978]), (3) if "'the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions'" (36 Cal.3d at pp. 554-555 [quoting People v. Sedeno (1974) 10 Cal.3d 703, 721]), or (4) under limited circumstances, if "the record not only

establishes the necessary intent as a matter of law but shows the contrary evidence not worthy of consideration." (36 Cal.3d at p. 556 [relying on standard drawn from People v. Cantrell (1973) 8 Cal.3 672, 685 and People v. Thornton (1974) 11 Cal.3d 738].)

In discussing this last exception -- which has its source in the Cantrell and Thornton cases -- Garcia explains: "In many cases it will be difficult to apply the Cantrell-Thornton analysis to Carlos error. If the defendant in a pre-Carlos trial was unaware that intent ro kill was an element of the felony-murder special circumstance, he might through ignorance fail to present evidence worthy of consideration on that matter. We could not in such cases affirm a special circumstance finding on the ground that defendant

did not introduce evidence sufficient to raise a material issue. But there may also be cases where the parties recognized that intent to kill was in issue, presented all evidence at their command on that issue, and in which the record not only establishes the necessary intent as a matter of law but shows the contrary evidence not worthy of consideration.[1/] In such a case the reasoning of Cantrell and Thornton may avoid a meaningless retrial." (36 Cal.3d at p. 556.) Garcia goes on to note, however, that because it is not clear that the

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1/ Garcia includes a footnote at this point which reads: "We note, for example, that the issue of intent may arise in connection with a prosecution attempt to prove first degree murder without reliance on the felony-murder rule, in connection with some special circumstance which expressly requires intent to kill, or at the penalty phase where lack of intent would be a mitigating factor." (36 Cal.3d at p. 556, fn. 12.)

Cantrell-Thornton exception will be approved by the federal high court, "pending further guidance from the United States Supreme Court, we will apply the reasoning of Cantrell and Thornton only to those cases clearly falling within the ambit of that reasoning so as not to detract substantially from the per se character of the high court's rule." (Ibid.)

Under Garcia's standards, reversal is required in this case. To begin with, it is clear that none of the first three exceptions is applicable here. As in Garcia, "[t]he omitted instruction on intent related to the special circumstance found to be true, not to some crime or special circumstance of which defendant was acquitted," "[d]efendant did not concede intent," and "[t]he Jury did not find

that he intended to kill in connection with some other, proper instruction." (Id. at pp. 556-557.)[2/]

2/ Although the Attorney General argues that, in light of defendant's conviction of attempted murder of Kevin Pickrell, the jury necessarily found an intent to kill, as we pointed out in Ramos I, the jury was improperly instructed on the attempted murder count and was never expressly told that the felony-murder doctrine was not applicable to attempted murder. (See 30 Cal.3d at pp. 583-584.)

In any event, even if the attempted-murder conviction could be construed as an implied finding that defendant intended to kill Pickrell, and even if that intent could be interpreted as applicable to Parrott as well (cf. People v. Murtishaw (1981) 29 Cal.3d 733, 765), it would clearly be improper to apply the Sedeno exception on the basis of the attempted-murder conviction in this case. As discussed above, at the time the jury returned that verdict defendant had presented no evidence at all on the intentional killing issue, and his offer of proof demonstrates that his decision not to contest the intent issue at the guilt phase was based directly on the trial court's ruling that an absence of intent to kill would not avoid a finding that the special circumstance was true and, consequently, an ultimate penalty trial. Under these

That leaves only the fourth exception -- Cantrell-Thornton. As noted above, with respect to this exception Garcia suggests that "there may . . . be cases where the parties recognized that intent to kill was in issue, presented all evidence at their command on that issue, and in which the record not only establishes the necessary intent as a matter of law but shows the contrary evidence not worthy of consideration." (36 Cal.3d at p. 556.) The Attorney General argues that the

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Footnote 2 continued:

circumstances, the attempted-murder conviction cannot properly be found to reflect a reliable jury determination on the intent-to-kill issue so as to establish the harmlessness of the Carlos error. We would surely be guilty of bootstrapping if we were to base a finding of no prejudice on a jury determination that may have resulted from an evidentiary void precipitated by the very error in question.

absence of an intent-to-kill instruction at the special circumstance phase should be found harmless under this exception based on the evidence on intent, or defendant's lack of such intent, that was presented at the penalty phase.

This is not a case, however, in which we can properly find that the record "not only establishes the necessary intent as a matter of law but shows the contrary evidence not worthy of consideration," particularly in light of Garcia's caveat that we will apply this exception "only to those cases clearly falling within the ambit of that reasoning so as not to detract substantially from the per se character of the high court's rule." (Italics added.) (Ibid.) As discussed above, defendant expressly testified at the penalty phase that when he shot Parrott and Pickrell,

he did not intend to kill them but intended only to graze them, attempting to mislead his accomplice into believing they had been killed.[3] Although defendant's testimony was self-serving and implausible, the undeniable fact is that Pickrell -- although shot at very close range -- was in fact only grazed by the bullet. In addition, both the medical evidence of the lacerations suffered by the victims on the back of their heads,

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3/ While the Attorney General argues that an intent to inflict serious bodily injury under circumstances posing a risk of death -- i.e., the "implied malice" standard -- ought to satisfy the intent-to-kill requirement of Carlos, that proposal is not compatible with Carlos. As applied in the special circumstance context, the intent-to-kill requirement elevates a first degree murder to a potential death penalty case; the implied-malice concept, by contrast, distinguishes involuntary manslaughter from second degree murder. Thus, intent to kill under Carlos means the specific intent to take another's life.

and Pickrell's testimony that he did not hear any gunshots or smell any smoke but simply felt a blow to his head, are consistent with defendant's testimony that he initially simply knocked the victims out with the metal pipe he was carrying and only later shot them at his accomplice's direction.

The jury was, of course, free to reject defendant's testimony and to find that he did, in fact, intend to kill both victims. Nonetheless, on this record the question of intent cannot be decided as a matter of law and defendant's evidence cannot be dismissed as "not worthy of consideration." Accordingly, reversal cannot be avoided under Cantrell-Thornton.

The Attorney General argues that even if the question of intent-to-kill cannot be decided as a matter of

law, reversal is not warranted here because we can tell that the jury -- after hearing defendant's evidence at the penalty phase -- in fact determined that he did intend to kill. The Attorney General points to the fact that during closing argument at the penalty phase the prosecutor told the jury at on point that "[i]f you do not feel that this is an execution murder, you should not return the penalty of death." Since rhe jury did return a death sentence, the Attorney General reasons that it necessarily found an intent-to-kill.

There are several flaws in this reasoning. First, the jury was, of course, not bound to accept the prosecutor's suggestion and was free, under the court's instructions, to impose a death sentence without finding an intentional killing. Second, even assuming

the jury chose to follow the quoted statement, there is nothing in that remark which told the jury that it had to find beyond a reasonable doubt that defendant intended to kill before it could return a death sentence; if the jury had been properly instructed at the special circumstance stage, it would have been told that the prosecution had to establish an intent-to-kill under that demanding standard of proof. Finally, although the prosecutor did make the above remark at one point in his closing argument, at other points he emphasized that under the applicable instructions of the 1978 law the jury was required to return a death sentence so long as it found that the aggravating factors present in the case outweighed the mitigating factors. Since, according to the prosecutor's argument,

there were numerous aggravating factors in this case and only a few, much less significant mitigating factors, the jury could well have believed that it was required to return a death sentence because the totality of the aggravating factors "outweighed" the mitigating factors, without regard to whether the killing was intentional or not. Under these circumstances, we cannot find that the sentence which the jury returned establishes that it properly found an intent to kill under the applicable beyond-a-reasonable-doubt standard.[4/]

4/ In declining to undertake a reexamination of the felony-murder doctrine in Ramos 1, we remarked that the case was an "inappropriate vehicle" for such an effort because "[t]he record in the guilt and penalty phases strongly suggests that the jury viewed the killing in this case as intentional and malicious." (30 Cal.3d at p. 590.) An accompanying footnote (30 Cal.3d at p. 590, fn. 17) makes it clear, however, that that observation was not intended

Accordingly, we conclude that defendant is entitled to a reversal of the special circumstance finding and penalty judgment, and a remand for a new trial of the special circumstance phase before a jury that is properly instructed that in order to sustain the special circumstance finding the prosecution must prove, beyond a reasonable

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Footnote 4 continued:

as the equivalent of a determination that the jury had actually found that defendant intended to kill. In that footnote, we adverted to defendant's argument "that the 1978 death penalty law is unconstitutional because it allows for the imposition of capital punishment without a determination that the defendant intended the death of the victim where the first degree murder conviction is based on a felony-murder theory," and noted simply that "[i]n view of our conclusion that the penalty determination must be reversed due to the unconstitutionality of the Briggs Instruction, we need not express an opinion on this additional contention." (Ibid.) (See also 30 Cal.3d at p. 584 & fn. 13.)

doubt, that defendant intended to kill the victim.

III

In light of this conclusion, there is no need to address the bulk of the penalty phase issues raised by defendant. The parties have, however, extensively briefed the question of the validity of the Briggs Instruction under the California Constitution, and for guidance both at retrial and in other cases we believe that it is appropriate to resolve that issue at this time.

Under California law, the trier of fact -- the jury, unless it is waived -- has the responsibility of fixing the defendant's sentence between two alternative punishments: death or confinement for life without possibility of parole. (§ 190.3.) In 1978, as part of an extensive revision of the death

penalty statutes by initiative, a new paragraph -- embodying what has come to be known as the Briggs Instruction -- was added to section 190.3. The paragraph reads in full: "The trier of fact shall be instructed that a sentence of confinement to state prison for a term of life without the possibility of parole may in future after sentence is imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California."

In Ramos I, we evaluated this instruction in light of federal constitutional principles that had been set forth in a number of recent United States Supreme Court death penalty decisions and concluded that the instruction was incompatible with the federal authorities in two separate respects.

(30 Cal.3d at pp. 590-602.) First, we concluded that the instruction, by directing the jury's attention to the possibility of a future gubernatorial commutation, conflicted with a line of decisions which had established "that in capital cases the Eighth Amendment requires that the decision whether a defendant is to live or die must be based upon 'consideration of the character and record of the individual offender and the circumstances of the particular offense.'" (30 Cal.3d at pp. 595-596 [quoting Woodson v. North Carolina (1976) 428 U.S. 280, 304; Lockett v. Ohio (1978) 438 U.S. 586, 603-608].) Second, we found that because the Briggs Instruction informed the jury that a sentence of life without possibility of parole main the future be transformed into a sentence which includes

the possibility of parole through the exercise of the gubernatorial commutation power, but did not tell the jury that a death sentence is also subject to the same gubernatorial prerogative, the instruction was misleading: it unconstitutionally "stacked the deck" against the defendant by suggesting to the jury that "the only way to be sure that the defendant is never again let loose upon society . . . is to impose a sentence of death." (30 Cal.3d at pp. 597-599 [citing Witherspoon v. Illinois (1968) 391 U.S. 510 521-523; Gardner v. Florida (1977) 430 U.S. 349, 358].)

The United States Supreme Court granted certiorari and, in a closely divided decision, disagreed with our conclusion that the Briggs Instruction conflicted with the principles enunciated in its earlier decisions.

(California v. Ramos, supra, 103 S.Ct. 3446.) In response to the claim that the instruction's focus on the gubernatorial commutation power improperly injected an irrelevant factor -- a factor which did not relate to the character or background of the offender or the circumstances of the offense -- into the capital sentencing process, the majority reasoned that the instruction actually invited the jury to consider the "future dangerousness" of the defendant rather than the actions of some future governor, and, relying heavily on its decision in Jurek v. Texas (1976) 428 U.S. 262, held that such consideration was constitutionally permissible. The court also rejected the contention that the incomplete nature of the instruction -- the omission of the fact that the death penalty, as well as life

without possibility of parole, is subject to gubernatorial commutation -- violated federal constitutional standards: it reasoned that advising the jury that a death sentence may also be commuted would not necessarily benefit a defendant because then the jurors -- informed that their decision was not final -- might "approach their sentencing decision with less appreciation for the gravity of their choice and for the moral responsibility reposed in them as sentencers." (103 S.Ct. at p. 3458.) Although the majority thus upheld the instruction against defendant's federal constitutional challenge, the court made clear that the validity of the Briggs Instruction under the California Constitution remained to be decided by this court on remand. (103 S.Ct. at p. 3451, fn. 7.)

It is to that issue that we now turn.[5/] As the Attorney General

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5/ In addition to challenging the instruction as violative of the state Constitution, defendant suggests that -- despite the United States Supreme Court's ruling -- we should again invalidate the instruction under federal due process principles. Defendant's argument rests on his contention that the holding in California v. Ramos was based on a misinterpretation of the relevant California death penalty statute, and that since this court is the final arbiter of the meaning of state statutes (see, e.g., O'Brien v. Skinner (1974) 414 U.S. 524, 531), we can correct the Supreme Court's statutory construction and then explain why the instruction violates federal due process principles under a proper interpretation of the California death penalty scheme.

Although we share defendant's doubts that the California death penalty provisions are as analogous to the Texas statutes approved in Jurek v. Texas, supra, as the majority in California v. Ramos suggested, we do not think that the Supreme Court s federal constitutional holding can be dismissed on the ground defendant proposes. As we understand its decision, the majority of the Supreme Court did not purport to "interpret" the California statute in a particular manner, but simply held that, for federal constitutional purposes, the statutory provision was similar enough to the Texas scheme to withstand a

acknowledges, "defendant's state constitutional . . . claim cannot be resolved by a mechanical invocation of current federal precedent." (People v. Chavez (1980) 26 Cal.3d 334, 352.) As we explained in Chavez: "California decisions have long recognized that '[s]tate courts in interpreting provisions of the state Constitution are not necessarily concluded by an interpretation placed on similar provisions in the federal Constitution.' [Citations.] This conclusion, of course, simply reflects one of the principal tenets of our federal system of government: just as the United States Supreme Court bears the

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Footnote 5 continued:

federal constitutional attack. The Supreme Court's resolution of that federal constitutional claim is, of course, binding on us. Thus, only the state constitutional issue is open for our determination.

ultimate judicial responsibility for determining matters of federal law, this court bears the ultimate judicial responsibility for resolving questions of state law, including the proper interpretation of provisions of the state Constitution. [Citation.] In fulfilling this difficult and grave responsibility, we cannot properly relegate our task to the judicial guardians of the federal Constitution, but instead must recognize our personal obligation to exercise independent legal judgment in ascertaining the meaning and application of state constitutional provisions." (Ibid.) (See also Cal.Const., art. I, § 24.)6/

6/ Our past cases clearly establish that article I, section 27 of the California Constitution -- enacted by initiative in 1972 -- does not insulate the Briggs Instruction from state constitutional review. As we explained in People v. Superior Court (Engert) (1982) 31 Cal.3d 797, 808: "The 1972

The California Constitution provides, in both article I, section 7 and article I, section 15, that a person may not "be deprived of life, liberty or property without due process of law." Although "due process" encompasses a broad range of safeguards, in essence the concept guarantees a fundamentally fair decision-making process. (See,

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Footnote 6 continued:

initiative was intended simply to cancel the holding of [People v. Anderson (1972) 6 Cal.3d 628], to clarify that the penalty of death does not violate any provision of the California Constitution . . . ." (Italics added.) As Justice Richardson stated in his lead opinion in People v. Frierson (1979) 25 Cal.3d 142, 186: "[P]roperly construed, section 27 validates the death penalty as a permissible type of punishment under the California Constitution." (Italics added.) Thus, in Engert, we held that "section 27 was not intended to insulate every potential capital case from the requirements of state constitutional due process." (31 Cal.3d at p. 809.) That conclusion is directly applicable here.

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e.g., People v. Ramirez (1979) 25 Cal.3d 260, 265-269; People v. Superior Court (Greer) (1977) 19 Cal.3d 255, 266.) As we shall explain, when viewed in relation to prior California decisions and to the overwhelming majority of related precedents in other states, the Briggs Instruction is incompatible with this guarantee of "fundamental fairness" both because it is seriously and prejudicially misleading and because it invites the jury to be influenced by speculative and improper considerations.

A

We begin with the misleading character of the instruction. Under the California Constitution, the Governor's power of commutation or pardon extends equally to a sentence of death and to a sentence of life without possibility of

parole. (Cal.Const., art. V, § 8.)[7/] The Briggs Instruction, however, informs the jury only that a sentence of life without possibility of parole may be commuted. Although the instruction is literally accurate as far as it goes, it is a classic example of a misleading "half-truth." Since the instruction is only given in a penalty trial -- when the jury's attention is narrowly focused on two alternative punishments -- the

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7/ Article V, section 8, provides in full: "Subject to application procedures provided by statute, the Governor, on conditions the Governor deems proper, may grant a reprieve, pardon, and commutation, after sentence, except in case of impeachment. The Governor shall report to the Legislature each reprieve, pardon, and commutation granted, stating the pertinent facts and the reasons for granting it. The Governor may not grant a pardon or commutation to a person twice convicted of a felony except on recommendation of the Supreme Court, 4 judges concurring."

instruction would reasonably be understood by the average juror to mean, by negative implication, that while a sentence of life without possibility of parole may be commuted, a sentence of death may not. Viewed realistically and in context, the instruction provides the jury with seriously misleading information.

In People v. Arbuckle (1978) 22 Cal.3d 749, 754-755, we observed that the "[r]eliability of the information considered [at the sentencing stage] is the key issue in determining fundamental fairness." In a variety of instances, California cases have condemned prosecutorial arguments to the jury which contained misleading statements of law with respect to post-conviction proceedings or the defendant's potential release. (See, e.g., People v. Modesto (1967)

66 Cal.2d 695, 708-709 [inaccurate statement that persons found not guilty by reason of insanity would be "turned loose"]; People v. Linden (1959) 52 Cal.2d 1, 26-27 [erroneous statement of the scope of this court's review on automatic appeal]; People v. Caetano (1947) 29 Cal.2d 616, 619-620 [suggestion that paroles are improvidently granted simply to provide space for incoming prisoners].) Because the Briggs Instruction embodies a comparable misstatement of law which the court itself must read to the jury to guide its penalty deliberations, we conclude that the instruction denies due process under the California Constitution.

The Attorney General attempts to defend the Briggs Instruction by arguing, on a number of different theories, that a defendant is in effect

not prejudiced by the incomplete nature of the instruction. He suggests first that a jury that is concerned about a defendant's potential release through gubernatorial commutation would not be any less inclined to vote for the death penalty if it were informed that even a death sentence would not necessarily prevent such release. But the pernicious effect of the Briggs Instruction is that it may lead a jury that does not believe that the death penalty is necessary, but fears a future commutation, to return a death penalty in the mistaken belief that that sentence alone will preclude any possible release. Because an accurately informed jury would at least realize that the possibility of gubernatorial action cannot be avoided in any event, it is less likely to return a death sentence when it is not

convinced that death is warranted. The prejudice to the defendant is manifest.8/

The Attorney General alternatively contends that the "half-truth" of the Briggs Instruction is justifiable because the "other half" of the truth -- informing the jury that a death sentence can also be commuted -- would inject additional prejudice, creating the risk that the jury might be less

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8/ For the same reason, the instruction cannot legitimately be defended as necessary to correct any allegedly misleading impression conveyed by the "life imprisonment without possibility of parole terminology. If the intent were simply to eliminate any possible misimpression that the jury may have, the instruction should tell the jury that both a sentence of life without possibility of parole and a sentence of death may be commuted to a sentence which includes the possibility of parole. If "life without parole" is "misleading" in that it does not take into account the possibility of commutation, "death" is equally flawed.

hesitant to impose the death penalty if it realized that the Governor could exercise leniency if he concluded that the jury had made a mistake in imposing death. It is undoubtedly true -- as we discuss below - that an instruction which informs the jury of the Governor's power to commute a death sentence does pose a danger of diminishing the jury's sense of responsibility, creating the risk that the jury may "pass the buck" to the Governor and not take personal responsibility for its sentencing decision. Indeed, this is the point made by the United States Supreme Court. (See p. __, ante.*/) But the existence of that particular untoward consequence does not eliminate or obviate the separate and distinct prejudice that

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*/ See pages [A-34 - A-37], ante.

flows to the defendant as a result of the Briggs Instruction's "half-truth." As just noted, because of the misleading character of the instruction, a jury that believes that death is not necessarily warranted may nonetheless impose death in the mistaken belief that that is the only penalty that will avoid the possibility of a commutation. The fact that an accurate instruction may also be harmful to a defendant in some other fashion cannot excuse the serious prejudice that flows directly from the misleading nature of the instruction.

Finally, and somewhat inconsistently with the immediately preceding contention, the Attorney General argues that the incomplete nature of the Briggs Instruction is not likely to be prejudicial because jurors can be expected to know, as a matter of common knowledge,

that a death sentence, as well as a sentence of life without possibility of parole, is subject to the Governor's commutation or pardon power. We doubt that the precise scope of the Governor's commutation power under the California Constitution is a matter of common knowledge.[9/] But even if a juror began the proceedings under the general impression that the Governor's power applied to both sentences, we think that the wording of the Briggs Instruction is reasonably likely to lead the juror to conclude that the commutation power only applies to life without possibility of parole. The negative implication of the

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9/ For example, it would be surprising if the average juror knew that if a defendant in a capital case has previously been convicted of a felony, the Governor may not grant a pardon or commutation "except on recommendation of the Supreme Court, 4 judges concurring." (Cal.Const., art. V, § 8.)

instruction is simply too strong to be ignored.

Accordingly, we conclude that the misleading nature of the instruction alone is enough to condemn it as an unconstitutional denial of due process.

B

Furthermore, even if the Briggs Instruction were modified so that it was totally accurate, the instruction would still violate the state constitutional due process guarantee because its reference to the commutation power invites the jury to consider matters that are both totally speculative and that should not, in any event, influence the jury's determination.

Over 20 years ago, in People v. Morse (1964) 60 Cal.2d 631, 636-653, we examined at length the propriety of an instruction which permitted a sentencing

jury to consider a variety of potential postconviction actions by other governmental entities -- parole, commutation, trial court review -- in determining the sentence that the defendant should receive. We concluded that any such consideration was totally improper and inconsistent with the jury's proper decision-making role.

Morse's conclusion in this regard is supported by the overwhelming majority of decisions from our sister states.[10] These numerous decisions --

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10/ Twenty-five other jurisdictions have concluded that the jury should not consider the possibility of pardon, parole or commutation. (See, e.g , Grady v. State (Ala.Crim.App. 1980) 391 So.2d 1095, 1097-1100; Westbrook v. State (1979) 265 Ark. 736 [580 S.W.2d 702, 708]; Sukle v. People (1941) 107 Colo. 269 [111 P.2d 233, 235]; Smith v. State (Del. 1974) 317 A.2d 20, 24-26; Paramore v. State (Fla. 1969) 229 So.2d 855, 860; Fleming v. State (1977) 240 Ga. 142, 146 [240 S.E.2d 37, 40], People v. Walker (1982)

which are by no means confined to the

Footnote 10 continued:

91 Ill.2d 502, 515 [440 N.E.2d 83, 88-90]; Farmer v. Commonwealth (Ky. 1970) 450 S.W.2d 494, 494-495; State v. Lindsey (La. 1981) 404 So.2d 466, 484-488; Poole v. State (1983) 295 Md. 167 [453 A.2d 1218, 1232-1233]; State v. Rollins (Mo. 1970) 449 S.W.2d 585, 591; Grandsinger v. State (1955) 161 Neb. 419 [73 N.W.2d 632, 650-651]; Serrano v. State (Nev. 1968) 447 P.2d 497, 499; State v. White (1958) 27 N.J. 158 [142 A.2d 65, 71-77]; State v. Jones (1979) 296 N.C. 495 [251 S.E.2d 425, 427-429]; McKee v. State (Okl.Cr.App. 1978) 576 P.2d 302, 305-306; State v. Leland (1951) 190 Or. 598 [227 P.2d 785, 796]; Commonwealth v. Aljoe (1966) 420 Pa. 198 [216 A.2d 50, 55-56]; State v. Atkinson (1970) 253 S.C. 531 [172 S.E.2d 111, 112]; Farris v. State (Tenn. 1976) 535 S.W.2d 608, 612-614; Clanton v. State (Tex.Crim.App. 1975) 528 S.W.2d 250, 252-254. Hinton v. Com. (1978) 219 Va. 492 [247 S.E.2d 704, 706]; State v. Todd (1970) 78 Wn.2d 362 [474 P.2d 542, 548-551]; State v. Lindsey (W.Va. 1977) 233 S.E.2d 734, 736-740 State v. Carroll (1937) 52 Wyo. 29 [69 P.2d 542, 559-564].)

Only three jurisdictions have reached a contrary conclusion. (Massa v. State (1930) 37 Ohio App. 532 [175 N.E. 219, 221-222]; State v. Jackson (1966) 100 Ariz. 91 [412 P.2d 36, 40-42]; Brewer v. State (Ind. 1981) 417 N.E.2d 889, 908-909.)

capital sentencing context - reflect a broad consensus that jury consideration of such matters is incompatible with a fair trial.

As the authorities explain, there are a variety of reasons why such consideration is improper. The first and perhaps most obvious problem is the speculative nature of the inquiry that the instruction invites. One principal difficulty, of course, lies in attempting to predict what a particular defendant is likely to be like some 10, 15, 20 or more years in the future when commutation may be considered. In People v. Murtishaw (1981) 29 Cal.3d 733, 767-775, we reviewed the recent scientific studies demonstrating the general unreliability of attempts to forecast future violence and concluded that in general expert testimony of a

defendant's alleged future dangerousness is not sufficiently reliable to be even considered at the penalty phase of a capital trial.

In the present context, moreover, the problems of prediction are of an entirely different, and greater, magnitude. Here, the jury must attempt to determine not only what a particular defendant will be like in the future but also what some presently unknown person -- a future Governor -- will do in response to the defendant's then condition. As the Supreme Court of Louisiana observed: "When a jury's attention is . . . thrust into speculation about the future action of as yet unknown actors, a serious possibility arises that each death sentence imposed under such conditions is the result of an interjection of an unquantifiable factor into the deliberation

process, thereby rendering the decision arbitrary. . . ." (State v. Lindsey, supra, 404 So.2d 466, 487.) Or, as the Tennessee Supreme Court put it: "This is trial 'by guess and by golly' and we will not countenance it by upholding a statute which offends every sense of fairness and every precept of due process." (Farris v. State, supra, 535 S.W.2d 608, 614.)11/

11/ The record in another automatic appeal pending before us clearly shows how the Briggs Instruction invites just such a speculative inquiry. In People v. Armendariz, Crim. 21956, the prosecutor told the jury: "So, not knowing what the future of California holds for us politically . . . I suggest to you that life without parole really is meaningless because who's to know in ten years what might be going on in the state, who might be Governor. . . . Who knows that perhaps a governor might be elected by the people who was willing to accept bribes for changing -- for pardoning people and commuting their sentence. You just can't count on what is going to happen in the future, what appropriately might be done. . . . [You] now are in the best position to

Furthermore, the problems posed by jury consideration of the possibility of future commutation extend much deeper than the threshold problems arising from the speculativeness of the inquiry. As a number of cases point out, any instruction which draws the jury's attention to the possibility of future actions by a governor or parole board is likely to affect the jury's decision-making process in either of two illegitimate -- though very different -- ways, diverting the jury from its proper function.

The first vice of such an instruction -- touched on already --

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Footnote 11 continued:

make a decision and you shouldn't leave it to someone in the future who might change that decision and reduce it substantially from what you might consider is appropriate, that is, life without parole." (Italics added.)

is that it may tend to diminish the jury's sense of responsibility for its action. As the Supreme Court of Delaware explained: "[K]nowledge on the part of the jury that there is possible review by other governmental authorities may cause that jury to avoid its responsibility. . . . [S]uch comment may imply to a jury that if it mistakenly convicts an innocent man, or mistakenly fails to recommend mercy, the error may be corrected by others; under such circumstances, a conviction is more likely and a recommendation of mercy less likely." (Smith v. State, supra, 317 A.2d 20, 25.)

For just this reason, over a quarter of a century ago we held in People v. Linden, supra, 52 Cal.2d 1, 27, that it is improper for a prosecutor to advise the jury of the automatic

appeal to this court whenever the death penalty is imposed: "[Jurors] should approach the tasks of finding facts and exercising discretion as to choice of penalty with appreciation that their duties are serious and that they are accountable for their decisions, not with the feeling that they are making mere tentative determinations which the courts can correct. The [jurors] have no concern with and should not be informed of the automatic appeal where judgment of death is imposed . . . . [¶] Argument such as that of the diminishes the [jurors'] recognition of their duties and responsibilities and powers." This reasoning applies equally to an instruction which directs the jury's attention to the gubernatorial commutation power.

Second, in addition to diminishing the jury's appreciation of its personal responsibility for the sentencing decision, an instruction on the possibility of commutation invites the jury to go beyond its proper role and attempt to "preempt" the Governor's constitutional authority by imposing a sentence that will at least minimize the opportunity for such a commutation. As the Supreme Court of Louisiana explained: "[P]ermiting a jury to consider the governor's possible grant of a pardon induces it to pass judgment upon the very issue entrusted only to the governor and Board of Pardons and could prevent them from deciding the issue at the proper time. [Citation.] The jury could conclude that the governor will improperly pardon dangerous offenders or commute their sentences,

thereby encouraging it to pre-empt the governor's power and defeat the constitutional design by opting for the death penalty." (State v. Lindsey, supra, 404 So.2d 466, 487.)

The impropriety in suggesting to a jury that it may base its sentencing decision on such a consideration is plain. As the New Jersey Supreme Court declared in State of White, supra, 27 N.J. 158 [142 A.2d 65, 76]: "It is no more proper for a jury to conclude that death be the penalty because a life sentence may be commuted or the defendant paroled, than it would be for a trial judge in other criminal causes deliberately to impose an excessive sentence to frustrate the statutory scheme committing parole to another agency."

Thus, upon analysis, it becomes clear that the Briggs Instruction

in reality serves no legitimate purpose. By drawing the jury's attention to the Governor's commutation power, the instruction invites the jury to second-guess a future Governor's exercise of his constitutional authority and to impose a harsher sentence than it might otherwise impose simply out of fear that the Governor and the parole authorities will make a mistake and will release the defendant while he is still dangerous. To permit a jury to act in this fashion is inconsistent with a defendant's right under the California Constitution to have the commutation decision made by the Governor and undermines the fairness of the jury's determination.

Accordingly, we conclude that the Briggs Instruction violates the due process clause of the California Constitution both because it is misleading and

because it invites the Jury to consider speculative and impermissible factors in reaching its decision. If this case reaches the penalty phase on remand, the instruction should not be given.12/

12/ While the Briggs Instruction clearly should not be given, there is a legitimate question whether in general a trial court should instruct the jury sua sponte that it should not consider the possibility of commutation in reaching its decision, or whether no instruction on the subject should be given at all.

When the jury raises the commutation issue itself -- either during voir dire or in a question posed to the court during deliberations -- the matter obviously cannot be avoided and is probably best handled by a short statement indicating that the Governor's commutation power applies to both sentences but emphasizing that it would be a violation of the Juror's duty to consider the possibility of such commutation in determining the appropriate sentence. (Cf. People v. Morse, supra, 60 Cal.2d 631, 648.)

When the issue is not expressly raised by the Jury, it is a close question whether it is preferable for the court to give such a cautionary instruction on the assumption that some jurors might otherwise be aware of the

IV

For the reasons discussed in part II, the judgment is reversed

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Footnote 12 continued:

possibility of commutation and improperly consider it, or whether such an instruction is simply more likely to bring the matter to the jury's attention and, as a practical matter, be difficult to follow.

A similar problem has arisen in the Fifth Amendment realm, with respect to an instruction that cautions the jury that it may not draw an adverse inference from the fact that a defendant has not testified at trial. In that context, California courts have held that while such an instruction must be given if requested by the defendant, a trial court has no duty to give the instruction sua sponte in light of the possibility that it would prove more prejudicial than beneficial. (See, e.g., People v. Gardner (1969) 71 Cal.2d 843, 852-854.) A similar approach -- permitting the defendant to assess the relative cost and benefit of a cautionary instruction in a particular case -- appears appropriate with regard to the commutation issue.

insofar as it relates to the special circumstance finding and penalty. On the issue of guilt, the judgment is affirmed.

KAUS, J.

WE CONCUR:

BIRD, C.J.
MOSK, J.
BROUSSARD, J.
REYNOSO, J.
GRODIN, J.

C O P Y

PEOPLE v. RAMOS
Crim. 21352

CONCURRING AND DISSENTING OPINION
BY LUCAS, J.

I concur in the majority opinion insofar as it affirms the judgment of guilt. I also reluctantly concur in the reversal of the judgment insofar as it relates to the special circumstances finding and penalty, under compulsion of People v. Garcia (1984) 36 Cal.3d 539, a case which, in my view, was incorrectly decided. (See id., at p. __ [dis. opn. on den. of rehg.]; People v. Whitt (1984) 36 Cal.3d 724, 749 [dis. opn.].) The present case involves a cold-blooded, execution-style murder, and it is inconceivable to me that the jury would have failed to find an intent to kill had it been instructed on that subject. Under Garcia's "reversible per

se" rule, however, the judgment must be reversed.

In addition, I dissent to the majority's further holding that the so-called "Briggs instruction" is unconstitutional, a holding which seemingly will result in summarily reversing 20 to 30 other capital cases wherein similar instructions were given. I suggest that such a wasteful result is wholly unjustified in light of the harmless contents of the challenged instruction.

Nearly three years ago, a majority of this court ruled that the Briggs instruction was invalid under the federal Constitution, despite Justice Richardson's admonition, in dissent, that no case had ever suggested any constitutional infirmity in informing the jurors regarding the Governor's commutation power. (People v. Ramos

(1982), 30 Cal.3d 553, 602-603 [Ramos I].) The case was reviewed by the United States Supreme Court where, as the dissent had predicted, the majority's holding was firmly discredited. (California v. Ramos (1983) __ U.S. __ [103 S.Ct. 3446].) In the meantime, of course, this case (and dozens of other automatic appeals raising the same issue) sat in abeyance, gathering dust.

Today, the majority attempts to resurrect its prior holding by relying upon the state Constitution, an issue left open in Ramos I (see 30 Cal.3d at p. 600, fn. 24). In other words, by reason of the majority's initial refusal to confront the independent state ground issue, the parties have wasted about three years which could have been spent retrying this case and all other affected cases.

In any event, the majority now reiterates its Ramos I analysis to the effect that the Briggs instruction denied the accused due process because it is "misleading" and invites the jury to "speculate" regarding future exercise of the commutation power. Both points are convincingly refuted by the high court's contrary analysis in California v. Ramos, supra, and by the dissent in Ramos I. Accordingly, I only briefly discuss those points here.

I. Instruction Not Misleading

The majority contends that the Briggs instruction is misleading because it fails to inform the jury that the Governor may commute a death sentence as well as a life-without-parole sentence. There are two conclusive responses to that argument: First, most jurors

already know of the Governor's commutation power, a matter of common knowledge in the community. (See Ramos I, 30 Cal.3d at p. 604, and cases cited [dis. opn. by Richardson, J.].) Second, any instruction which attempted to emphasize the Governor's power to commute a death sentence would be declared invalid as tending to minimize the jury's sense of responsibility. (See id., at pp. 603-604; California v. Ramos, supra, at p. ___ [103 S.Ct. at pp. 3457-3458].) As stated by the high court in rejecting this precise argument, "A jury concerned about preventing the defendant's potential return to society will not be any less inclined to vote for the death penalty upon learning that even a death sentence may not have such an effect. In fact, advising jurors that a death verdict is theoretically modifiable. and

thus not 'final.' may incline them to approach their sentencing decision with less appreciation for the gravity of their choice and for the moral responsibility reposed in them as sentencers." (Id., at p. __ [p. 3458].)

2. Instruction Not an Invitation to Speculate

The majority also suggests that the Briggs instruction invites the jury to speculate regarding an irrelevant factor, namely, the possible future exercise of the Governor's power to commute a sentence of life without parole. As the Ramos I dissent pointed out, "To the contrary, the instruction is purely informational, explaining to those jurors who might otherwise be misled that a sentence denominated 'life imprisonment without possibility of parole'

is nonetheless subject to possible commutation by the Governor. [Citation.]" (30 Cal.3d at p. 603.)

The United States Supreme Court agreed, observing that the challenged instruction "was merely an accurate statement of a potential sentencing alternative . . . . The Briggs instruction thus corrects a misconception and supplies the jury with accurate information for its deliberation in selecting an appropriate sentence." (__ U.S. at p. __ [103 S.Ct. at p. 3457].) As the high court explained, the instruction brings to the jury's attention "the possibility that the defendant may be returned to society," thereby properly inviting the jury "to assess whether the defendant is someone whose probable future behavior makes it

undesirable that he be permitted to return to society." (Id. at p. __ [p. 3454].)

3. Conclusion

As I have indicated, the majority now relies exclusively upon the state Constitution to support its invalidation of the Briggs instruction. In my view, not only does this holding come three years too late, but it also frustrates the spirit, if not the letter, of the very Constitution on which the majority so belatedly relies. Article I, section 27, of the California Constitution, adopted in 1972 by the people of this state, was intended to reinstate the death penalty "to the extent permitted by federal constitutional law." (People v. Frierson (1979) 25 Cal.3d 142, 186, italics added; see People v. Superior Court (Engert) 31 Cal.3d 797,

814 [dis. opn. by Richardson, J.].) Federal constitutional law, as interpreted by this nation's highest court, now clearly permits the jury in a death penalty case to be informed of the Governor's commutation power. (California v. Ramos, supra, __ U.S. __ [103 S.Ct. 3446].) Accordingly, by reason of article I, section 27, we have no authority to impose additional restrictions or procedures not required by federal law.

In my view, the Briggs instruction is constitutional. The majority's contrary holding ignores the people's will as expressed in their own Constitution. I respectfully dissent to that holding.

LUCAS, J.

APPENDIX B

APPENDIX B

Filed December 13, 1984

ORDER DENYING REHEARING

CR. NO. 21352

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

PEOPLE,
Respondent

v.

MARCELINO RAMOS,
Appellant

Respondent's petition for rehearing DENIED.

The application for stay of issuance of remittitur is DENIED.

Lucas, J., is of the opinion the petition should be granted.

[signed]

Rose Bird
Chief Justice

ORIGINAL

Supreme Court, U.S.
FILED
APR 19 1985
ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

84-1227 (3)

STATE OF CALIFORNIA,

Petitioner,

v.

MARCELINO RAMOS,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of the
State of California

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-1227

STATE OF CALIFORNIA, Petitioner, v. MARCELINO RAMOS, Respondent.	RESPONDENT'S BRIEF IN OPPOSITION

PREFACE:

The State of California has petitioned for a writ of certiorari based upon three grounds. As will be seen below, the first and third grounds do not even present a federal question. The second ground has already been the subject of a Petition for Certiorari by the State of California which has most recently been denied. California v. Garcia, No. 84-949, cert. den., February 19, 1985.

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ARGUMENT

I.

THE CALIFORNIA SUPREME COURT'S REVERSAL OF THE FELONY-MURDER SPECIAL CIRCUMSTANCE PRESENTS NO FEDERAL QUESTION.

Petitioner first complains because the California Supreme Court applied its own opinions in Carlos v. Superior Court (1984) 35 Cal.3d 131 [197 Cal.Rptr. 79, 672 P.2d 682] and People v. Garcia (1984) 36 Cal.3d 539 [205 Cal.Rptr. 265, 684 P.2d 826] on remand.

No federal question arises when a State Supreme Court applies its own intervening state law decisions to a case pending on appeal.

All the California Supreme Court did in this case was to refuse to apply the state's "law of the case doctrine"[1/] --a doctrine wholly grounded in state law [2/]-- to preclude application of newly decided capital decisions.

On January 25, 1982, the California Supreme Court decided Ramos I. People v. Ramos (1982) 30 Cal.3d 553 [180 Cal.Rptr. 266, 639 P.2d 908].

On July 6, 1983, this Court reversed and remanded Ramos I. California v. Ramos __U.S.__, 77 L.Ed.2d 1171, 103 S.Ct. 3446 (1983).

On December 12, 1983, the California Supreme Court

1/ Indeed, California's "law of the case doctrine" applies only to issues of law, not to issues of fact (Selby Construction v. McCarthy (1979) 91 Cal.App.3d 517, 522 [154 Cal.Rptr. 104]. Moreover, before the issue arises as to whether or not the doctrine applies, it must be found that the point of law was necessary to the prior decision, that the matter must have been actually presented and determined by the court, and that application of the doctrine will not result in an unjust decision. People v. Shuey (1975) 13 Cal.3d 835, 842 [120 Cal.Rptr. 83, 533 P.2d 24]; People v. Medina (1972) 6 Cal.3d 484, 491, fn. 7 [99 Cal.Rptr. 630, 492 P.2d 686].

2/ California's "law of the case doctrine" rests neither in whole nor in part on Federal Constitutional provision, statute, case law, or policy grounds. Rather, the doctrine has been adopted by California courts as an aid to the management of state court dockets and procedures. It is one of California's "fundamental rules of appellate procedure" (People v. Shuey, supra, 13 Cal.3d at 841) adopted "for reasons of policy and convenience." United Dredging Co. v. Industrial Acc. Com. (1930) 208 Cal. 705, 712. [284 P. 922]. California decisions clearly "treat the doctrine as merely one of policy . . ." 6 Witkin, California Procedure, (2nd Ed., 1971), 636, p. 4555.

decided People v. Garcia, supra.

On November 1, 1984, the California Supreme Court decided Ramos II. People v. Ramos (1984) 37 Cal.3d 136 [__ Cal.Rptr.__, __ P.2d__]; see Appendices to Petition, A-2 to A-72.

The California Supreme Court did not decide Ramos II because the People sought certiorari in Ramos I, and no such claim is made in the pending petition for certiorari. The People have already had their day in court on the Carlos/Garcia [3/] issue.

As the California Supreme Court held in, Ramos II, in rejecting the People's argument regarding the "law of the case," an exception to that doctrine applies to cases where the controlling rules of law have been altered or clarified by a decision intervening between the first and second determinations. "Carlos is, of course, just such a clarifying intervening decision." (Ibid., 37 Cal.3d at 146; Appendices To Petition, A-15).

It is equally clear that the decision in Ramos II to apply Garcia retroactively raises no federal question as California has adopted its retroactivity standards without reliance upon any Federal Constitutional provision, statute, case or policy. See People v. Garcia, supra, 36 Cal.3d at 548-549; In re Johnson (1970) 3 Cal.3d 404, 410 [90 Cal.Rptr. 569, 475 P.2d 841]; Donaldson v. Superior Court (1983) 35 Cal.3d 24 [196 Cal.Rptr. 704, 672 P.2d 110].

It is axiomatic that California has the right to manage its own docket, and to determine its own state law questions of "law of the case" and retroactivity. Thus, no federal question is presented to this Corut by argument I of the Petition.

3/ The People's Petition for Certiorari in People v. Garcia, supra, has recently been denied. See California v. Garcia, No. 84-949, cert. den., February 19, 1985.

II.

THE HARMLESS ERROR TEST ESPOUSED IN PEOPLE V. GARCIA IS CORRECT.

The State of California urges that, "Certiorari also should be granted so that People v. Garcia, supra, 36 Cal.3d 539, can be re-evaluated. This matter is already before this Court in California v. Garcia (cert. pending)." (Petition, at 33).

Garcia v. California is no longer pending. On February 19, 1985, cert. was denied. Therefore, this issue has already been rejected, very recently, by this Court, and for good reason. This response draws to a large extent on the one filed in Garcia with some adaptations to the instant case.

California has, consistent with its own authority, defined the statutory elements of a "special circumstance" (capital) first degree murder (see California Penal Code, § 192.2, subd.(a)(17)) so as to include an intent-to-kill requirement before defendant can be subjected to the alternative punishment of death or life without possibility of parole Carlos v. Superior Court (1983) 35 Cal.3d 131, 151-154 (197 Cal. Rptr. 79, 672 P.2d 862].[4/]

Thus, while the felony-murder rule remains a viable theory of first degree murder under existing California law (California Penal Code, § 187, 189; People v. Dillon (1982) 34 Cal.3d 441 [194 Cal.Rptr. 390, 668 P.2d 297]), California requires proof of an additional element, i.e. intent-to-kill, before that felony-murder becomes a capital murder. Carlos v. Superior Court, supra, at 153-154.

California, consistent with its authority and duty to define those crimes and criminals for which capital punishment may be appropriate (Gregg v. Georgia (1976) 428 U.S. 153, 186; Zant v. Stephens (1983) __ U.S. __ [77 L.Ed.2d 235, 250-251, fns. 15 and 17]), treats the special circumstances as

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4 / Non-capital murder of the first degree is punishable in California by imprisonment for an indeterminant term of 25 years to life. California Penal Code, § 190-190.1.

though they were elements of a criminal offense (People v. Garcia (1984) 36 Cal.3d 539, 551-552 [205 Cal.Rptr. 265, 684 P.2d 826].

The California Supreme Court's decision in Carlos, supra, confirmed a substantive definition of a criminal offense duly promulgated by state enactment. People v. Garcia, 36 Cal.3d at 549). Garcia merely applied that definition to ensure that defendants who do not intend-to-kill are not subjected to the potential alternative punishment of death or life imprisonment without possibility of parole under California's special circumstance statutory scheme. In the instant case, the California Supreme Court merely applied its two own decisions, Carlos and Garcia, and found that since there was no finding of intent to kill, a retrial on the finding of special circumstances was necessitated.

Nevertheless, California herein argues, as it did in the recently denied California v. Garcia, supra, that an inappropriate test of prejudice has been developed by California. This issue was previously presented in the recently denied California v. Garcia, supra. California's position flies in the face of this Court's previous decisions.

Every defendant has due process rights to a jury trial in which the state bears the burden of proving beyond a reasonable doubt each fact necessary to constitute the crime charged. United States Constitution, Sixth and Fourteenth Amendments; Duncan v. Louisiana (1967) 391 U.S. 145, 149-150; In re Winship (1970) 397 U.S. 358, 364. Withdrawing a critical element of the charge from the fact finder's determination by failing (in the instant case, refusing, infra) to deliver

instructions on it violates constitutional guarantees of due process, the right to a jury trial, the right to a fair trial, and conflicts with the presumption of innocence. Connecticut v. Johnson (1983) __ U.S. __ [74 L.Ed.2d 823, 835; Morisett v. United States (1951) 342 U.S. 246, 275.

Petitioner attempts to argue, as petitioner did in Garcia, supra, that Sandstrom v. Montana, Connecticut v. Johnson, and Mullaney v. Wilbur (1975) 421 U.S. 684 dealt with presumptions based upon jury instructions that were given, and that the instant case is somehow distinguishable because the jury was not told intent could be presumed (Petition, 37-39).

That reasoning if flawed. We have already shown that California treats its special circumstances defining California Penal Code, § 190.2 subd.(a)(17) as though they are elements of an offense for all practical due process purposes. (See Ramos v. Superior Court (1982) 32 Cal.3d 26, 32-33 [184 Cal.Rptr. 622, 648 P.2d 589]; People v. Superior Court (Engert) (1982) 31 Cal.3d 797, 803 [183 Cal.Rptr. 800 647 P.2d 76]; People v. Green (1980) 27 Cal.3d 1, 62 [164 Cal.Rptr. 1, 609 P.2d 468]; Ghent v. Superior Court (1979) 90 Cal.App.3d 944, 952-955, and fns. 9-10 [153 Cal.Rptr. 720]). The trial on the determination of the special circumstance allegations is not only conducted at the same time as are the issues of guilt and innocence (California Penal Code, § 190.1), under California law they have all "the hallmarks of the trial on guilt or innocence." Bullington v. Missouri (1981) 451 U.S. 430, 439-441, 444-446; (emphasis added).

Thus, the foundation of petitioner's challenge to the application of fundamental due process principles to special circumstance determination is fatally flawed.

Additionally, the type of per se rule adopted by the California Supreme Court is totally consistent with this Court's own precedent. Garcia simply held that where an

element of the special circumstance allegation is totally withdrawn from the jury's determination by failing to deliver any instructions thereon and where an appellate court cannot determine, from the verdict forms returned in light of the instructions actually given, that the jury necessarily resolved that critical element against the accused, any finding by that jury on that special circumstance allegation is per se unreliable. People v. Garcia, supra, 36 Cal.3d 539, 556.[5/] Even this portion of the Garcia decision is predicated in substantial part on California law[6/].

In Connecticut v. Johnson, supra, a 4-member plurality of this Court held that a presumption which permits a jury to convict without ever examining the evidence concerning an element of the offense charged deprives the defendant of "'constitutional rights so basic to a fair trial that their infractions can never be treated as harmless error.'" (74 L.Ed.2d at p. 835; emphasis added). If the jury may have failed to consider evidence of intent, "a review in court cannot hold that the error did not contribute to the verdict. The fact that the reviewing court may view the evidence of intent as overwhelming is then simply irrelevant." (Id., at pp. 833-834; emphasis added).

Four dissenting justices took issue with the

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5 / See Connecticut v. Johnson, supra, 74 L.Ed.2d 823, 835 (See also dissent opn. of Mr. Justice Powell, joined by Chief Justice Burger and Justices Rehnquist and O'Connor at pp. 840 and 841, fn. 3; Sandstrom v. Montana (1979) 422 U.S. 510, 520; Presnell v. Georgia (1979) 438 U.S. 14, 16; In re Winship (1970) 397 U.S. 358, 364; Duncan v. Louisiana (1967) 391 U.S. 145, 149-150; Speiser v. Randell (1958) 357 U.S. 513, 526; Carpenters and Joiners of America v. United States (1946) 330 U.S. 395, 408; Bollenbach v. United States (1946) 326 U.S. 607, 613-615.

6 / See Garcia's discussion of People v. Cantrell (1973) 8 Cal.3d 672 and People v. Thornton (1974) 11 Cal.3d 738 and People v. Sedeno (1974) 10 Cal.3d at 703 (Garcia, supra, 36 Cal.3d at 554).

plurality's conclusion that Johnson was necessarily denied a jury determination on the issue of intent so as to entitle him to automatic reversal (Id., at p. 840; opn. of Mr. Justice Powell). Rather, the dissent viewed the Sandstrom-type presumption instructions as not operating independently of the evidence. "The jury must look to the evidence initially to see if basic facts have been proved before it can consider whether it is appropriate to apply the presumption." (Ibid.; emphasis added). The dissenters opined that "it was necessary for the jury to look to the facts and circumstances to determine what [Johnson] did -- i.e. to consider the character and quality of his acts -- before it could define the natural and necessary consequences of those acts. If, however, the basic facts are themselves depositive of intent, the presumption becomes unnecessary to the jury's task of finding intent. Because the presumption does not remove the issue of intent from the jury's consideration, it does not preclude a reviewing court from determining whether the error was 'harmless beyond a reasonable doubt." (Citations)." (Id., at pp. 840-841; emphasis added).

The dissenters made clear, however, that had Johnson involved the situation which "remove[d] the issue of intent from the jury's consideration", thereby permitting the "'jury to convict without ever examining the evidence concerning an element of the crimes charged,'" (74 L.Ed.2d at p. 840 and fn. 3, 841), a reviewing court would have been precluded from applying a Chapman[7/] test of prejudice, and automatic reversal would have been required. (Ibid.; see also Jackson v. Virginia (1979) 443 U.S. 307, 320, fn. 14; Bollenbach v. United States, supra, 326 U.S. 607, 610-615.

Thus, both the plurality and dissenting opinions in Johnson agree that a conviction is fundamentally flawed

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7/ Chapman v. California (1967) 386 U.S. 18.

flawed when obtained through a process which instructs the fact-finder to return a guilty verdict without examining the evidence concerning a necessary element of the charge.

The instructional error at issue in the case at bench, where felony murder special circumstances have been found true without a corresponding finding of intent to kill, is more acute than the errors addressed in Sandstrom, supra, and Connecticut. Respondent's jury was never even told that intent-to-kill was a necessary element of the special allegation. They were simply instructed that if the defendant participated in one of the listed felonies and someone was killed during its commission,[8/] this special circumstance allegation was established as a matter of law, and the existence of an intent-to-kill was totally irrelevant.

Indeed, in the instant case respondent requested and instruction on intent-to-kill during the guilt phase, and the instruction was refused. As noted in the opinion (Appendice to Petition), the California Supreme Court has clearly held that based upon the facts and evidence presented in the case, this is not a case where necessary intent was established as a matter of law, as contrary evidence worthy of consideration was presented in the penalty phase (Appendice to Petition, A-22 to A-25). This factual finding by the California Supreme Court must be accorded a presumption of correctness. Sumner v. Mata (1982) 455 U.S. 591, 102 S.Ct. 1303, 71 L.Ed.2d 480.

Moreover, the prejudice in the instant case is overwhelming where a charge was felony-murder (intent-to-kill clearly not required under California law), and where the prosecutor repeatedly argued for conviction based upon the felony murder doctrine.

Thus, respondent was truly convicted "of a charge on which [he was] never tried." (Presnell v. Georgia, supra,

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8/ See California Penal Code, § 190.2, subd.(a)(17)(i-viii).

439 U.S. 14, 16). The test was appropriately determiend by the California Supreme Court and appropriately applied in this case.[9/]

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III.

THE USE OF THE DOCTRINE OF INDEPENDENT STATE GROUNDS WAS CLEARLY APPROPRIATE IN THIS CASE.

The final argument in the Petition for Certiorari is frivolous. In California v. Ramos, supra, this Court explicitly left it open for the California Supreme Court to address the question of whether the commutation instruction compelled by California Penal Code, § 190.2 "independently violates any provisions of the State Constitution." (Id., 103 S.Ct. at 3541, n. 7). On remand the California Supreme Court did nothing more than follow this Court's invitation. The California Supreme Court first noted that while this Court had "upheld the [Briggs] instruction against defendant's federal constitutional challenge, the court made clear that the validity of the Briggs Instruction under the California Constitution remained to be decided by this court on remand (__ U.S.__ at p.___ [77 L.Ed.21 at p. 1178, 103 S.Ct. at p. 3541, fn. 7].)" People v. Ramos, 37 Cal.3d at 151; Appendices to Petition for Certiorari, at A-35; emphasis in original).

In its Opinion, the California Supreme Court expressly and frequently alluded to its authority and responsibility to construe the California Constitution independently from the United States Constitution (see, e.g., People v. Ramos, 37 Cal.3d at 143, 151, 152-153; Appendices to Petition for Certiorari at A-4, A-35, A-37-38).

The decision of a state court to afford its citizens greater protection under the state's constitution than this Court believes to be required by the federal constitution presents no federal question. Prune Yard Shopping Center v. Robins (1980) 447 U.S. 74, 81.

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CONCLUSION

It is thus submitted that the Petition for Certiorari ought to be denied.

DATED: APRIL 16, 1985

Respectfully submitted,

BUSHNELL, CAPLAN & FIELDING

BY: Alan M. Caplan
ALAN M. CAPLAN, ESQ.
Attorneys for Respondents

AFFIDAVIT OF SERVICE BY MAIL

Attorney BUSHNELL, CAPLAN & FIELDING No. 84-1227

PEOPLE OF THE STATE OF CALIFORNIA,)
)
Petitioner,)
)
v.)
)
MARCELINO RAMOS,)
)
Respondent.)

I, the undersigned, say:

I am a citizen of the United States, over 18 years of age, employed in the City & County of San Francisco, in which City & County the within mentioned mailings occurred, and not a party to the subjected cause, my business address being 680 Beach Street, Suite 372, San Francisco, CA 94109.

I served the within RESPONDENT'S BRIEF IN OPPOSITION to the California Supreme Court as follows: An original and 3 copies on the United States Supreme Court, Alexander L. Stevas, Clerk, United States Supreme Court, Washington, DC 20543, of which a true and correct copy of the document filed in the cause as affixed by placing one copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectfully as follows:

John K. Van de Kamp, Attorney General
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Frank O. Bell, Jr.
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Lee A. Branch, Clerk
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Santa Ana, CA 92702
For delivery to: Honorable R.J. Beacom, Jr., Judge

Each envelope was then sealed and with postage prepaid, deposited in the United States mail by me at San Francisco, CA on April 18, 1985.

There is a delivery service by United States mail at each place so addressed or regular communication by United States mail between the place of mailing and each mailed so addressed.

I declare under penalty of perjury that the foregoing is true and correct and that this affidavit was executed at San Francisco, CA on April 18, 1985.

Alan M. Caplan
ALAN M. CAPLAN, ESQ.

Barbara Brever
NOTARY PUBLIC

My commission expires:

OFFICIAL SEAL
BARBARA BREVER
NOTARY PUBLIC CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO
My Comm. Expires Dec 16 1988